Supreme Court, U.S.
FILED
JUN - 9 1994
OFFICE OF THE CLERK

(3)

No. 93-1313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PATRICIA L. WHITE,

Petitioner,

v.

MARVIN L. RUNYON, POSTMASTER GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO HER PETITION FOR WRIT OF CERTIORARI

Squire Padgett, *Counsel of Record*
David L. Rose,
Debra Palmer-Henry
1835 Street, N.W., Suite 900
Washington, D.C. 20006-1203
(202) 296-2266
Attorneys for the Petitioner
PATRICIA L. WHITE

---

11 pp

TABLE OF CONTENTS

Table of Authorities i

Argument 1

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Baxter Healthcare Corp.,
13 F.3d 1120 (7th Cir. 1994) 7

Dandrige v. Williams,
397 U.S. 471, 475 n.6 (1970) 2

DeMarco v. Holy Cross High School,
4 F.3d 166 (2nd Cir. 1993) 7

Durham v. Xerox Corp.,
18 F.3d 836 (10th Cir. 1994) 7

Gaworski v. ITT Commercial Finance Corp.,
17 F.3d 1104 (8th Cir. 1994) 4, 7

Hairston v. Gainesville Sun Pub. Co.,
9 F.3d 913 (11th Cir. 1993) 4, 6

Hazen Paper Co. v. Biggins,
113 S.Ct. 1701 (1993) 4

Houston v. Hill,
482 U.S. 451 (1987) 3

TABLE OF AUTHORITIES

Cases **Page**

LeBlanc v. Great Am. Ins. Co.,
6 F.3d 836 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994) 7

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 802 (1973) 1, 3

Mitchell v. Data General Corp.,
12 F.3d 1310 (4th Cir. 1993) 6, 7

Olivera v. Nestle Puerto Rico, Inc.,
922 F.2d 43 (1st Cir. 1990) 7

Schiro v. Farley,
114 S.Ct. 783 (1994) 2

St. Mary's Honor Ctr. v. Hicks,
___ U.S. ___, 113 S.Ct. 2742 (1993) 4, 6, 7

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248, 253 (1981) 1, 2, 3

United States v. Williams,
112 S.Ct. 1735, 1738 (1992) 3

Washington v. Garrot,
10 F.3d 1421 (9th Cir. 1993) 6

Statutes

42 U.S.C. 2000e, *et. seq* . . . . . passim

No. 93-1313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PATRICIA L. WHITE,

Petitioner,

v.

MARVIN L. RUNYON, POSTMASTER GENERAL,

Respondent.

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO HER PETITION FOR WRIT OF CERTIORARI

1. The Petitioner and the brief of the amici curiae Womens Legal Defense Fund, *et. al.*, request that this Court review the Fourth Circuit's decision which sustained the lawfulness of the Postal Service's practice of granting lighter duty assignments to non-pregnant employees who are injured on-the-job, while denying lighter duty work to pregnant employees whose disability arises from pregnancy, but who are similar in their ability or inability to work. Petition at 14; Amicus Brief at 2. That decision has broad application to pregnant workers of the Postal Service throughout the United States. Under the Title VII analysis ostensibly followed by the Fourth Circuit, defendant's stated basis for refusing to grant Petitioner lighter duty assignments would only be a defense if it were a

"legitimate, nondiscriminatory reason." *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), cited and relied upon by the Fourth Circuit, Pet. App. 6a.

Here, the reason advanced by the Postal Service and accepted by the Fourth Circuit is neither "legitimate" nor "nondiscriminatory" because it violates Title VII as amended by the Pregnancy Discrimination Act. Yet, the Fourth Circuit relied upon that reason without purporting to determine that it was a "legitimate nondiscriminatory reason." The Postal Service did not attempt to defend the legality of the policy below nor has it asserted that the policy is not currently being followed.

a. Under settled law the holder of a judgment may defend the judgment based on any matter appearing in the record. Petition at 18, (*citing Dandrige v. Williams*, 397 U.S. 471, 475 n.6 (1970)). The Respondent argues that the Fourth Circuit was correct when it declined to rule expressly on this issue because it was not properly raised and was not considered by the district court. Respondent's Brief at 11. However, Ms. White, as the plaintiff-appellee, properly raised this issue before the court of appeals as a ground to uphold and support the district court's judgment in her favor.

That the Petitioner properly raised the issue below so that it can be considered by this Court is demonstrated by the Court's decision in *Schiro v. Farley*, 114 S.Ct. 783 (1994). There the respondent, who had failed to raise an issue in the lower courts, raised the argument for the first time in this Court in order to defend the decision rendered below. *Id.* at 788. Citing the *Dandridge* decision, this Court concluded that "[w]hile we ordinarily do not review claims made for the first time in this Court, ... we recognize that the State, as respondent, is entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, 114 S.Ct. at 788. Like the respondent in *Schiro*, Ms. White was entitled to raise this argument in the court of appeals in defense of the judgment of the district court and the Fourth Circuit was obliged to give it consideration. The Fourth Circuit erred in declining to review the issue expressly.

b. The Respondent's suggestion that this Court should decline to review this issue because it was not passed upon by a lower court, is equally without merit because the Petitioner raised and briefed this issue before the court of appeals in support of the district court judgment. Respondent's Brief at 11. The rule that "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below' . . . operates (as it is phrased) in the disjunctive. . . ." *United States v. Williams* 112 S.Ct. 1735, 1738 (1992). As a result, if the issue is pressed by a party in the Court of Appeals but is not passed upon by that court, the question is nevertheless properly before this Court. *Id.*

Consistent with the reasoning in *Williams,* this Court has also concluded that it is not barred from considering an issue that a party does not raise until it loses in the court of appeals and that is not addressed by that court after a rehearing *en banc. Houston v. Hill,* 482 U.S. 451, 467 n.16 (1987). Because the Petitioner fully briefed and asserted this issue before the Fourth Circuit in support of the judgment of the district court, the question is properly before this Court. Moreover, we believe the record will show that the issue was passed upon by the district court.[1] As a result, this issue should and can be fully considered by the Court.

Moreover, the justification stated by the Postal Service for refusing to grant Petitioner lighter duty assignments can only be grounds for sustaining the lawfulness of that conduct if it was a "legitimate, non-discriminatory reason." *Burdine, supra,* 450 U.S. at 253; *McDonnell Douglas Corp., supra* , 411 U.S. at 802. The Fourth Circuit decision is not compatible with Title VII as amended by the Pregnancy Discrimination Act if, as Petitioner contends, the policy relied upon by the Postal Service was unlawful. *Id.* The decision on the lawfulness was, therefore, an

---

[1]In her brief as appellee, Petitioner stated that she did not "expressly" argue this issue before the district court, but that she did believe that the court based its ruling upon this ground. Appellee's Brief at 42 n.9; Pet. App. 16a.

integral and necessary part of the Fourth Circuit's decision.[2]

c. The Respondent also asserts that there is an insufficient factual record to address this issue. Respondent's Brief at 12. However, we believe the policy is itself discriminatory under the Pregnancy Discrimination Act. The record included the written policy and its application in this case. That record alone was sufficient for a ruling that the policy was neither "legitimate" nor "non-discriminatory" because it was in violation of Title VII, as amended.

2. Even apart from the worthiness for certiorari of the Pregnancy Discrimination Act issue, this case is worthy of this Court's review based upon the continuing conflict between the circuits regarding the type of proof that is required before a case can be sent to a factfinder for a ruling on the ultimate question of discrimination. As further explained below, the district court in this case ruled in a manner that is consistent with the rulings of at least two other circuits that have interpreted *St. Mary's Honor Ctr. v. Hicks, ___ U.S.____, 113 S.Ct. 2742 (1993) (hereinafter St. Mary's Honor)*. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993); *Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir. 1994)*. The decision of the Fourth Circuit is in conflict with those decisions.

---

[2]This Courts' decision in *Hazen Paper Co. v. Biggins,* 113 S.Ct. 1701 (1993) can be contrasted from this case. In *Hazen*, this Court reversed the court of appeals ruling that there was unlawful discrimination based on the Age Discrimination in Employment Act of 1967. Unlike this case, however, the *Hazen* case did not involve an underlying finding of discrimination and the reason given to support the action was not illegitimate under the controlling statute. Here, the district court found, as a fact, that there was discrimination. Pet. App. at 16a. Moreover, the reason advanced by the Postal Service for the actions taken against the Petitioner was itself illegal under the Pregnancy Discrimination Act.

In this case, the district court concluded that the plaintiff had proven a *prima facie* case by establishing facts which demonstrated that the defendant's actions were more likely than not due to the intentional consideration of sex. Pet. App. 15a. Next, it found that the Postal Service's explanation was an "arbitrary, artificial distinction that could not negate its liability." Pet. App. 15a. After making this finding of pretext, and specifically stating that the plaintiff had satisfied the ultimate burden of persuading the trier of fact, the district court found that the Postal Service had discriminated on the basis of sex.[3] Pet. App. 16a.

Although the district court found that the Petitioner had established a *prima facie* case and the district court disbelieved the reasons advanced by the Postal Service and found the Postal Service's conduct to be discriminatory, the Fourth Circuit

---

[3]The Respondent asserts that the court of appeals simply concluded that it was clear error for the district court to find intentional discrimination based solely on the evidence of an incorrect reading of the collective bargaining agreement. Respondent's Brief at 9. However, the district court did not state that its finding was restricted solely to this evidence. Indeed, the district court found that the "record [was] replete with evidence that each controversy arose out of *one of plaintiff's pregnancies* and the interpretation of the Agreement by defendant's management representatives." App. 14a (emphasis added). Among some of the uncontradicted evidence that the district court could have reasonably relied upon was the testimony that Supervisor Stallings: 1). made repeated requests from her for particularized medical documentation, although he had evidence of her pregnancy; 2). curtailed the distribution of her mail when she was on leave so that there would be more work for her to do when she returned; and 3). stated that "if [she] cared about [her] child, [she] wouldn't be working." 3 JA 416-23. Supervisor Stallings even suspended and removed her from service when, according to Postmaster Saylor, such action was "unjustified." 3 JA 423-27, 676-77. Moreover, there were three different explanations advanced for granting Rural Carrier Franz assistance after his heart attack. *See* Pet. at 9, para. 2.

required evidence, over and above the evidence advanced to support plaintiff's *prima facie* case, to sustain the district court's finding of discrimination. Pet. App. 8a. By so holding, the Fourth Circuit continued to apply its analysis which requires not only evidence sufficient to constitute a *prima facie* case, but also additional evidence, independent of the evidence constituting the *prima facie* case, that the employer's proffered reason is false and discriminatory. Under the line of cases following the reasoning of the Fourth Circuit, a plaintiff will never be able to meet its ultimate burden of proving intentional discrimination based on the evidence presented in its *prima facie* case alone. *See, e.g., Mitchell v. Data General Corp.*, 12 F.3d 1310, 1317 (4th Cir. 1993)("the plaintiff can fail to meet his burden, not only by failing to establish a prima facie case, but also by failing to show a genuine factual dispute over the employer's legitimate nondiscriminatory explanation.").

The conflict amongst the circuits has continued after the *St. Mary's Honor* decision. The decisions of the Eleventh and Eighth Circuits have held that proof of a *prima facie* case is alone sufficient to send the case to the jury and to sustain a finding of discrimination. In *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993), the Eleventh Circuit held that:

> In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish a prima facie case. ... Accordingly, the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the 'elusive factual question' of intentional discrimination.

Id. (citations omitted); *accord Washington v. Garrot*, 10 F.3d 1421 (9th Cir. 1993)("Because, as *St. Mary's* recognizes, the factfinder ... is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its

action is true."). The Eighth Circuit rendered a similar ruling in *Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1110 (8th Cir. 1994)* where it held that: "*Hicks* established that '[n]o additional proof of discrimination is required.' Based upon the elements of the plaintiff's prima facie case and the jury's rejection of the defendant's explanations, the jury could infer that discrimination had occurred." At least two other circuits appear to follow another standard different from that followed by the Fourth Circuit.[4]

---

[4]The Seventh Circuit has observed that the First Circuit's "plus" standard was rejected by this Court in *St. Mary's Honor. Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994)("it appears that the Court adopted this circuit's version of the 'pretext-only' rule rather than the 'pretext-plus' approach of the First Circuit."). This is an implicit recognition that the Fourth Circuit's standard has also been rejected since the Fourth Circuit follows the First Circuit's "plus" rule. *Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 48 (1st Cir. 1990)*. The First and Fourth Circuits, have continued to follow this rule after *St. Mary's Honor*. *See Le Blanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1317 (4th Cir. 1993). According to the Seventh Circuit, under *St. Mary's Honor*, a plaintiff who proves her *prima facie* case and shows that the employers proffered reasons are false may prevail "not automatically as a matter of law, but through submission of her case to the ultimate factfinder. . . ." *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994). *See also, DeMarco v. Holy Cross High School*, 4 F.3d 166, 170 (2nd Cir. 1993) ("[p]roof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by an improper discriminatory intent ..."); *Durham v. Xerox Corp.*, 18 F.3d 836 839-40 (10th Cir. 1994) ("Although a prima facie case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination and thus preclude summary judgment").

This case presents an important question regarding the degree of proof which a plaintiff must produce in order to have the case decided by the finder of fact. The Fourth Circuit's decision is directly at odds with the decisions of the Eighth, Ninth and Eleventh Circuits, and is different from decisions of the Second, Seventh, and Tenth Circuits. Because there remains a continuing conflict among the circuits, review by this Court is warranted to resolve this conflict.

CONCLUSION

For the reasons set forth above, this Court should grant the petition and review the decision below.

Respectfully submitted,

Squire Padgett,
Counsel of Record
David L. Rose
Debra Palmer-Henry
1835 Street, N.W., Suite 900
Washington, D.C. 20006-1203
(202) 296-2266
Attorneys for the Petitioner
Patricia L. White

June 9, 1994